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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
NO. 09-100

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

RAYMOND DESHA DAVIS
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS

Petitioner raised three questions in the Petition for Writ of Certiorari. The questions may be differently asked as follows:

I.

Must *Miranda* warnings be given before a person seized during the execution of a search warrant for drugs is interrogated concerning residency in that premises?

II.

Where the trial court judge reasonably found the police officer's testimony not credible, and the Michigan state courts correctly followed United States Supreme Court precedent, and there was no valid waiver of the Respondent's Fifth Amendment protections, were statements made following a custodial interrogation -- without recitation of the Miranda rights -- properly suppressed?

III.

Missouri v. Seibert prohibits an 'end-run' around a suspect's Fifth Amendment rights where that individual is subject to a custodial interrogation. Does Seibert require suppression of the subsequent statement, where there was continuity of time, place, and participants and there was no attenuation of the primary taint?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOW COMES Raymond Desha Davis, by and through his attorney, Sheldon Halpern, and prays this Honorable Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Michigan Court of Appeals opinion and the Michigan Supreme Court order are attached to Petitioner's petition as Appendices A and B, respectively, and are incorporated herein by reference.

STATEMENT OF JURISDICTION

Petitioner's petition for writ of certiorari was filed pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment, reads in relevant part:

No person shall be ... compelled in a criminal case to be a witness against himself ...

The United States Constitution, Fourteenth Amendment, reads in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Detroit police officers executed a search warrant in a narcotics raid at a house at 20416 Hull Street in Detroit on September 13, 2006. When several officers entered the house Mr. Davis left through a bedroom window; he was seized in the yard and taken back inside. Several other people who had been present were already secured and handcuffed; Mr. Davis was similarly handcuffed and placed with the others. The searching officers found illegal drugs and two firearms inside the home; some of the drugs were in plain-view in the bedroom, the window of which Mr. Davis exited as the officers entered (Preliminary examination transcript, 12/13/2006, pp. 26, 27, 29.

Officer Robert Gadwell assisted with detaining those present (*Id.* at p. 34). Gadwell said that he obtained some basic information from those present, and that "Mr. Davis in particular told [him] that he was living at that location at the time" (*Id.* at p. 35). Gadwell said that after one of the officers found narcotics in the house Gadwell arrested Mr. Davis and recited the *Miranda* warnings. Gadwell said he then obtained some basic information from Mr. Davis, and that Davis, after initially talking with the officer, did not waive his rights and refused to sign any statement; Davis terminated the interview (*Id.* at p. 37).

When Gadwell was asked by the prosecutor if he did anything further after he took the statement from Mr. Davis [prior to it being terminated by Mr. Davis], Gadwell replied "The only other thing I did in regard to that was take his personal information in which he stated - - he give (sic) me that address as his address. He stated he lived there for three weeks" (*Id.* at p. 40).

Gadwell said that residency questions are asked during raids to determine the presence of other people in the dwelling, or the presence of animals (Evidentiary hearing transcript ("HT"), 11/09/2007, p. 12). Additionally, he said, they like to know if the people present are supposed to be there at the location, and, "a lot of times," the officers need to know who the tax owner is or something" (*Id.* at p. 13). When asked if it was something significant to determine who was the resident of the house, Gadwell testified that "no," it was not (*Id.* at p. 38). The legal owner is not necessarily significant, Gadwell said, but he does like to know who that person is (Id. at pp. 45-46). When asked whether or not finding out the identity of the owner/resident is something that can be used to connect the person to drugs, or that pertains to a case, Gadwell replied "sometimes," but "not always' (*Id.* at pp. 47, 53).

Wayne County Circuit Court Judge Carole Youngblood found that Officer Gadwell was not credible in his testimony concerning several key points. For example, Gadwell maintained that the question of residence had nothing to do with the elements of the crimes, *i.e.,* narcotic and firearm possession offenses, underlying the search warrant executed on that day. The Circuit Judge observed that "It is less than genuine, and actually preposterous, to then opine that the issue of who lives in the house is not relevant to who is charged with possession" (*Opinion and Order Granting Defendant's Motion to Suppress Statements* ("Opinion"), dated December 14, 2007, p. 7; HT, p. 38). Indeed, Officer Gadwell said that Mr. Davis was arrested because of the statement and the observations by other officers that Davis had jumped out of the bedroom window (HT, p. 48). As correctly noted by Judge Youngblood, the "sole purpose of the question is to evoke an incriminating response to support constructive rather than actual possession" (Opinion, p. 7). Also, Gadwell's stated

reason for questioning about residence, i.e., to determine during the securing of the premises of anyone else or dogs were present, was not credible, for when Gadwell first asked the question the house had already been secured (*Id.* at p. 7, recounting the testimony of two other officers of the raid team that Mr. Davis was only taken back into the house *after* the house had been secured).

Judge Youngblood further found that Davis was not free to leave and was in custody at the time of Gadwell's questioning, designed to elicit an incriminating response, and a recitation of *Miranda* rights was therefore necessary. Judge Youngblood found that the taint from that first statement continued through the second, post-*Miranda* elicitation. Further, the Judge found no evidence that Mr. Davis voluntarily waived his constitutional rights; that is, the People failed in their burden of proof (Opinion, pp. 8-11).

Gadwell was asked several times if Davis was asked if he wanted to answer questions, and whether or not Davis had waived his rights to remain silent and to counsel; Gadwell *never* gave an affirmative answer. Instead, his response was that the officer just "continued to talk to him" (HT, p. 11).

The Michigan Court of Appeals afforded Judge Youngblood proper deference in witness credibility, and also held that Mr. Davis was in custody -- although not formally under arrest -- when he was seized outside, brought back inside and handcuffed, and that the subsequent questioning by Gadwell, likely to elicit an incriminating response, was interrogation necessitating *Miranda* warnings *(People v Davis*, unpublished per curiam opinion of the Court of Appeals, decided December 18, 2008 (Docket No. 282886), pp. 2-3) [the opinion is Appendix A in Petitioner's petition, and is incorporated herein by reference]. The Michigan Court of Appeals also noted that the police were in the process of executing a search warrant for illegal narcotics, Davis had

been detained while trying to flee the premises, and his pre-*Miranda* statement about living at the residence was one of the two reasons given by Officer Gadwell for making the arrest (*Id.* at p. 3).

The Michigan Supreme Court denied leave to appeal on May 1, 2009 (the order denying leave to appeal is Appendix B to Petitioner's petition, and is incorporated herein by reference).

OPPOSITION TO REASONS FOR GRANTING THE WRIT

Petitioner raised three bases for granting the writ: 1) to clarify that Summers detainees are not entitled to *Miranda* warnings; 2) to ratify an "implicit holding" in *Pennsylvania v. Muniz;* and 3) to correct a "misunderstanding and misapplication" of *Missouri v. Seibert.* None of the reasons merit granting the writ.

The prosecution bears the burden of establishing that a purported waiver of a suspect's Fifth Amendment rights to counsel and to remain silent was voluntarily made. *Colorado v. Connelly*, 479 U.S. 157, 168, 170, 107 S. Ct. 515 (1986)(in order to be valid, a waiver must be voluntarily made and must be the product of a "free and deliberate choice, rather than [as a result of] intimidation, coercion or deception"); *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966). A two-part inquiry determines whether a valid waiver has occurred: First, the relinquishment of the right "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135 (1986).

Petitioner has never established a valid waiver of rights. The Circuit Judge properly found that the prosecution failed to meet its burden; that is, no credible evidence was presented to establish that Davis waived his constitutional protections (Opinion, p. 11). Further, the Court noted that even were Officer Gadwell's testimony to be believed it would establish only that Mr. Davis was *subsequently* advised of his *Miranda* rights, but it would not establish any waiver of those rights (*Id.*).

In *Pennsylvania v. Muniz,* 496 U.S. 582, 110 S. Ct. 2638 (1990), this Court held that the *Miranda* protections apply where the police expressly question a suspect, or where there is the "functional equivalent" of express questioning; that includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." See, also, *Rhode Island v. Innis,* 446 U.S. 291, 302, 100 S. Ct. 1682 (1980). In *Muniz*, the Court examined a factual situation where a drunk-driving suspect was being booked at the police station and was asked eight questions; the booking process was videotaped. The suspect was asked his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. The last question, which the suspect could not answer in his condition, was determined to be testimonial, and the Court ruled that it should be suppressed. The first seven questions, however, were administrative in nature and were not designed to elicit an incriminating response.

In the instant case, Davis was charged with possessing the drugs and guns found inside the particular dwelling. The officer twice asked for, in the course of the raid, Mr. Davis' address; the first instance preceded any *Miranda* warnings; the second was after Mr. Davis terminated the interview and while the interrogation record was prepared. The questions were manifestly designed to elicit an incriminating response

directly related to the drugs found on that premises during the execution of the drug-related search warrant. Gadwell knew that an answer to his question of 'who lives here,' *in the context of a drug raid,* was obviously and "reasonably likely to elicit an incriminating response from the suspect." *Muniz, supra.* The *Muniz* decision made clear that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." 496 U.S. at 594. Gadwell's testimony at the hearing suggesting that the questioning of Mr. Davis about residency was merely incidental, almost collateral, and essentially an administrative procedure, to the reason why the officers were present at 20416 Hull, was incredible.

Officer Gadwell also said that an interrogation record "has nothing to do with the case and the crime" (HT, p. 36). In some other case that may be true. However, in the context of a drug-raid, generally, and this case, specifically, where the officers already have probable cause to believe a possession crime has been or is being committed, the elicitation through interrogation of information directly relevant to an element of that criminal charge requires suppression of the evidence obtained in contravention of the suspect's constitutional protections. *Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979); Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963).

The statements attributed to Mr. Davis were communications which explicitly or implicitly related factual assertions; that is, they were testimonial. Mr. Davis' situation was not merely one of relating personal data during the booking process after an arrest, as in *Muniz*, but was responsive to the interrogation of the officer to elicit the information needed by the officer to obtain the probable cause to make the arrest. Without the residency answer Mr. Davis would not have been arrested for the possession offenses. The *Muniz* majority, in any event, rejected an argument that the

booking questions asked of Muniz (name, address, height, weight, eye color, et cetera) did not constitute custodial interrogation. The Court stated it disagreed:

> " ... with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis, supra,* merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the *Innis* test focuses primarily upon "the perspective of the suspect." *Muniz*, supra, 496 U.S. at 601.

It is common knowledge that police seek indicia of residency in the execution of drug-related search warrants. Such indicia go directly to an element of the offense, *i.e.,* the individual's possession, actual or constructive, of the contraband. When police execute a search warrant there has already been a determination of probable cause and the officers are then expressly searching for specific and identified contraband and other incriminating evidence. This is not a case where an officer happens upon some event and merely asks 'what happened.' Instead, after Mr. Davis was brought back inside, handcuffed and seated with the other occupants, they were asked who lived there, a question manifestly designed to secure the proof necessary to legitimize an arrest. It was not a booking or administrative process; rather, the question was tantamount to asking 'whose drugs are these?', a testimonial question designed to elicit incriminating information and prohibited by *Innis.* See, also, *Dunaway, supra,* wherein this Court held that where the defendant had been picked-up for questioning on the basis of a tip and taken in for questioning, and although not told that he was under arrest he nevertheless would not have been free to leave, the resulting incriminating statements had to be suppressed.

The *Dunaway* Court also stated that:

> "[T]he application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause" 442 U.S. at 212 (Internal citations omitted).

In contrast, in *California v. Beheler,* 463 U.S. 1121, 103 S. Ct. 3517 (1983), the third case Petitioner contends requires clarification (Petition for Writ of Certiorari ("Petition"), p. 13), the suspect had voluntarily accompanied police to the station and gave a voluntary interview. This Court, noting that Beheler had not been taken into custody or otherwise deprived of his liberty, held *Miranda* warnings were not required, although the questioning occurred in the 'coercive environment' of a police station. 463 U.S. 1124-1125, and citing *Oregon v. Mathiason,* 429 U.S. 472, 97 S. Ct. 711 (1971).

Mr. Davis, clearly, was not free to leave. In fact, according to testimony of officers Mr. Davis tried to leave upon the officers' arrival, but was seized, moved back inside,

handcuffed, and then questioned. His case is analogous in relevant part to that in *Dunaway.*

In the case of *Michigan v. Summers,* 452 U.S. 692, 101 S. Ct. 2587 (1981), the Court upheld the search, where, during the execution of a search warrant at the defendant's home, the defendant was taken back into the house from an outside porch, was subsequently searched and the narcotics were found in his coat. Summers addressed the Fourth Amendment implications underlying the seizure and detention; that is, the issue involved "only the constitutionality of a pre-arrest "seizure." 452 U.S. 696. The Court also held that "Furthermore, the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, *because the information the officers seek normally will be obtained through the search, and not through the detention."* 452 U.S. at 701 (emphasis supplied). Accordingly, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants of the premises while a proper search is conducted." 453 U.S. at 705.

In the case at issue the officers, in contravention of Mr. Davis' Fifth Amendment constitutional right against self-incrimination, exploited the un-*Mirandized* interrogation to obtain the two statements at issue. The officers did not merely detain the people while the search for physical evidence was conducted. The occupants were seized, handcuffed, *and* interrogated. Mr. Davis was arrested as a direct result of the incriminating answer he gave in response to Officer Gadwell's interrogation. Contrary to Petitioner's assertion that "Respondent here was merely detained, with others, in the living room of his own house" (Petition, p. 14), there was no evidence as to the identity of the property owner. Gadwell admitted that he never even looked at Davis' driver's license (HT, pp. 41, 43-45). In the second round of questioning

Gadwell elicited from Mr. Davis that he had been living at the house for several weeks (Id. at 64-65). *Summers* requires no clarification of the type requested by Petitioner, and the instant facts do not justify issuance of the writ.

Additionally, the instant case is distinguishable from *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984), cited by Petitioner. *Berkemer* addressed a traffic stop detention (itself a significantly distinguishing fact), and the case provides no substantive support for Petitioner's argument. The *Berkemer* Court upheld the search in large part because of the brief and public nature of the detention, and for the reason that there usually are fewer officers present during a traffic stop than might be found in a police station. Overall, the atmosphere surrounding the brief traffic encounter is thus seen as not so coercive as to render it unreasonable. In contrast, however, the instant case involves, as Judge Youngblood correctly found, "an interrogation in an extremely coercive police environment with *at least six police officers present in the house*" (Opinion, p. 8) (emphasis supplied).

There was no intervening event, other than the giving of *Miranda* rights, between the initial illegal interrogation about the residence and the subsequent statements at issue. The events were close in time and place. The illegality thus was not adequately attenuated so as to render the subsequently-obtained statements admissible. *Brown v. Illinois*, 422 U.S. 590, 602-603, 95 S. Ct. 2254 (1975) ("Miranda warnings do not cure an illegal arrest, and do not in and of themselves break the causal link"). As *Brown* also stated, "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint" (*Id.* at 602).

The burden is on the government to prove there was no causal connection between the evidence sought to be admitted and the illegality. *Taylor v. Alabama,* 457 U.S. 687, 689-690, 102 S. Ct. 2664 (1982); *Dunaway, supra,* 442 U.S. at 217, 218 (even if a defendant makes a voluntary statement after an illegal arrest the taint is not necessarily attenuated; the voluntariness for the 5th Amendment analysis is a threshold for 4th Amendment analysis). Subsequent compliance with the mandates of the Fifth Amendment, therefore, does not necessarily validate the incriminating statements obtained. Dunaway, 442 U.S. at 217; Brown, 422 U.S. at 602-603.

The case of *Missouri v. Seibert,* 542 U.S. 600, 124 S. Ct. 2601 (2004), is helpful by analogy. In the plurality decision the Court expressly noted that a "midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement ... [and] is inadmissible." Additionally, the Court observed that "By any objective measure, the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, *close in time and similar in content.* After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset..." (emphasis supplied).

The Court further expressly noted that the police tactics there used distinguished it from *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285 (1985), which allowed as admissible a second, *Mirandized* statement taken after a prior questioning without warnings, by noting that the police in Seibert sought an end-run around Miranda. In Seibert there was initial questioning during which incriminating statements were obtained, then there was a break of fifteen to twenty minutes, then the questioning resumed with warnings in the

same physical place as had the unwarned segment, and there was a continuity of officers. Additionally, "in particular, the police did not advise that her prior statement could not be used," and the police fostered the impression that the second series of questions was a *continuation of the first* (emphasis supplied). The Court concluded that because the warnings were inadequate, there was "no need to assess the actual voluntariness of the statement." *Id.* at Fn 8.

In *Elstad,* the second-round of questioning occurred later at a police station and was thus a new interrogation; the taint from the earlier interrogation was attenuated. In the instant case, there was no break in the events; the officer not only commenced the interrogation in the same house in a short period of time, but, more coercively, perhaps, moved Mr. Davis for the second round of interrogation into the very room where the drugs were found. There was a continuity of time, place, and participants. The taint was not attenuated and *Elstad* provides no valid basis for the admissibility of the tainted statements at issue in this case.

CONCLUSION

Petitioner contends that this Court's holdings in *Elstad* and *Seibert* have "created an uncertain legal framework whenever the police initially fail to mirandize a suspect". Further, that "[w]ithout a settled precedent, courts are left on their own to determine whether a subsequent statement is never, sometimes, or almost always admissible" (Petition, p. 26).

This Court has made clear through its decisions in *Miranda, Summers, Dunaway,* as well as in Seibert, and others, that "end-runs" around an individual's constitutional guarantees are impermissible. This Court has not created an uncertain legal framework; rather, any existing uncertainty stems from the failure of law enforcement to carefully comply with constitutional mandates and clear precedent existing in the decisions of this Court. Petitioner's suggestion that courts need a clarified rule is misguided, and actually suggests an unnecessary limit upon trial courts to accommodate constitutionally deficient acts and performance by law enforcement. Trial courts are in the best position to weigh credibility. Gadwell's credibility was weighed and was found wanting. Had he *Mirandized* Mr. Davis before the interrogation, as required by this Court's clear precedents and the applicable Amendments, there would be no issue.

RELIEF

Wherefore, Respondent requests the petition be denied.

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